## APPENDIX A.

LOGAN COLLINS, - - - - - - - - *Appellant,*

*v.*

COMMONWEALTH OF KENTUCKY, - - - - *Appellee.*

### OPINION OF THE COURT BY JUDGE STEWART—AFFIRMING.

Logan Collins was convicted of the offense of carrying a deadly weapon concealed, in violation of KRS 435.230 (1), and was given a sentence of two years in the State Reformatory at LaGrange. He filed a motion and grounds for new trial which was overruled. Time was given to prepare a bill of exceptions until the 24th of February, 1956 term, of the lower court. On March 8, 1956, the bill of exceptions was signed and approved by the circuit judge and ordered filed and made a part of the record. On March 5, 1956, three days before the certification of the bill of exceptions, Collins lodged a petition for a writ of coram nobis, supported by four affidavits, one of which was later withdrawn. Five days later the Commonwealth entered a response supported by counter affidavits. The petition was dismissed without a hearing on March 12, 1956.

This appeal is prosecuted from the judgment entered on the jury verdict, and also from the order dismissing the petition.

We will first consider the appeal from the judgment of conviction. There is only one ground urged for reversal and this concerns a remark of the trial judge made during the course of the trial. To grasp the significance of the statement it will be necessary to give the factual background. Collins was arrested for being publicly drunk and a search of his person brought to light a snubnosed .38 revolver in the right front pocket of his trousers. One

of Collins' principal contentions was that the pistol could not have been concealed because the pocket the gun was in had been sewed up so near the opening that the pistol would not fit all the way down and therefore was in plain sight. The Commonwealth, of course, maintained the pocket had been sewed up after the incident. Collins testified that carrying large quantities of change around in his pockets, as he constantly did in his business, had ripped his pockets on several occasions, and that this particular pocket had been sewed up at least three times. At this juncture in his testimony the trial judge interjected: "They've been sewn up once since you had that pistol taken out of them, too, haven't they?"

Collins insists this utterance of the trial judge indicated to the jury his disbelief in the veracity of Collins' testimony on this point and that this tended to prejudice the jury against him. We think that this gratuitous statement might have had that effect, and we believe the observation of the trial judge, carrying with it the weight that a circuit judge's words usually have on a jury, was so prejudicial that it would constitute a reversible error if such were properly before us. However, the record shows that the language under attack was not objected to in any manner; hence, it must be deemed to have been waived. It is an elementary rule of procedure in a criminal trial that errors not brought to the attention of the trial judge and not preserved by exceptions to his rulings are not available on an appeal to this Court. See Ramsey v. Commonwealth and Guinan v. Commonwealth, Ky., 267 S. W. 2d 730; Warren v. Commonwealth, Ky., 256 S. W. 368.

The appeal from the order entered below dismissing the petition for a writ of coram nobis advances two alleged errors as a basis for the reversal of the judgment: (1) The writ should have been granted because a deputy sheriff of Perry County served on the grand jury which returned the indictment against Collins; and (2) the writ

should have issued because Collins' substantial rights were prejudiced by improper remarks supposedly made by the trial judge in the presence of the jury, and when Collins and his counsel were outside the courtroom, which tended to discredit his defense.

We agree with the trial judge that the petition should have been denied. A writ of coram nobis is an extraordinary remedy, Kinder v. Commonwealth, Ky., 269 S. W. 2d 212, and it is well established that this extraordinary remedy may be resorted to only after all other judicial processes have been exhausted. Merrifield v. Commonwealth, Ky., 283 S. W. 2d 214. The writ will not lie where there is another adequate remedy. 24 C. J. S., Criminal Law, p. 147. Was there another adequate remedy in this case? Obviously there was, because we believe it cannot be questioned, under the facts presented, that when Collins appealed from the judgment of conviction he had ample opportunity to include in the appeal record all the alleged errors he complained of in his petition for a writ of coram nobis.

That Collins did not take advantage of the opportunity to embrace all his grounds for reversal in the direct appeal record is attributable to his failure to act seasonably. It is conceded the issues raised in the petition are "new matters" in the sense that the record of the appeal from the judgment of conviction is silent with reference to them, but this does not mean, if he had been diligent, they could not have been promptly discovered and properly authenticated in that record for consideration by this court. One of the alleged errors occurred before the trial; the other, during it. Thus it is clear Collins learned of, or could have ascertained, these so-called errors in time to have included them in his motion and grounds for a new trial and to have had them duly incorporated in the bill of exceptions. Thereafter he could have appealed from any rulings that were adverse to him. Not only was appeal an

adequate remedy under the circumstances, and this fact in itself requires a denial of the writ Collins seeks, but coram nobis also will not lie where advantage could have been taken of the alleged error at the trial, as where facts complained of were known before or at the trial or could by due diligence have been ascertained. See 24 C. J. S., Criminal Law, p. 148.

More to the point is the general proposition that it is improper to seek a writ of coram nobis while an appeal of the case is pending, even if the writ is sought on grounds which would not be available in the appeal itself. In other words, there is no need to seek extraordinary relief to set aside a judgment which is not final, since it is always possible it might be reversed on appeal. Though there is no authority on this point in this jurisdiction, the case of Stephenson v. State, 206 Ind. 171, 186 N. E. 293, made the following pertinent statement in this connection: "The court in which the judgment was originally entered has no jurisdiction to entertain such a petition (i.e. a petition for a writ of coram nobis) pending disposition of an appeal to this court * * *." It is apparent, under the authority of the Stephenson opinion, that coram nobis was resorted to prematurely.

Running like a thread throughout the brief of Collins' attorney is the contention that he was denied due process of law because his petition was dismissed without a hearing. As we have previously shown in our discussion the petition did not state sufficient facts to justify the issuance of the writ. Aside from this, it has been held that since coram nobis is essentially a civil action no constitutional rights are infringed when the trial court refused to follow the procedures ordinarily associated with criminal prosecutions. See Elliott v. Commonwealth and Same v. Buchanan, 292 Ky. 614, 167 S. W. 2d 703.

For the reasons given, the judgment in each case is affirmed.

## APPENDIX B.

COMMONWEALTH OF KENTUCKY, - - - - *Plaintiff,*

*v.* 4972

LOGAN COLLINS, - - - - - - - *Defendant.*

## JUDGMENT CARRYING CONCEALED A DEADLY WEAPON.

The defendant was brought into open court in custody of the Jailer and was informed as the nature of the indictment, his pleas and the verdict of the jury, and was asked by the court if he had any legal grounds for show the court why judgment should not be passed on him, and none shown the court, it is the judgment of this court that the defendant be taken by the sheriff of Perry County, and there delivered to the Warden of the State Reformatory at LaGrange, Kentucky, and there be confined for the period of two (2) years at hard labor.

This 21st day of November, 1955.

## APPENDIX C.

### REDIRECT EXAMINATION OF LOGAN COLLINS IN PART.

Q. 1. You are the same Logan Collins who is the defendant in this case?

A. I am.

Q. 2. Do you have the overall trousers that you were wearing on that occasion when Jack Fields arrested you?

A. I do.

Q. 3. Will you describe them to the jury first—the pockets, and the condition of them, and all, before I hand them to you?

A. Yes. The pockets of them, they're worn out, and had been sewn up, because in my business there, I carry quite a bit of change around, and therefore, my pockets wear out pretty fast—pretty rapid, and those pockets, both pockets, have been sewn up—one of them has been sewn up three times, to make them so they would hold my change—

By the Court: They've been sewn up once since you had that pistol taken out of them too, haven't they?

A. Absolutely not.

## APPENDIX D.

### AFFIDAVIT OF FRANK HOUNSHEL IN PART.

Affiant states that during the trial of the case of Commonwealth v. Logan Collins in the Perry Circuit Court on the 21st day of November, 1955, I was in the court room immediately prior to the time court resumed after the Noon recess; the defendant and his attorney were in a conference in an anteroom of the court house. The trial Judge was on the bench and the jury trying the case was in the box; I was seated near the rear of the court room; at that time and place I heard the Judge say to the Clerk "tell them to come in, they have already had an hour to fix that pocket that the gun was in".

Affiant states that on one or two other occasions the Judge, in the presence of the Jury, referred to the pocket of the trousers having been sewed up, in a tone of voice and in a manner that conveyed the impression that the Court did not believe the testimony of the defendant previously given to the jury that the pocket had been sewed up prior to his arrest on the charges for which he was being tried.

(s) Frank Hounshel

Subscribed and sworn to before me by Frank Hounshel this the 23rd day of February, 1956.

My commission will expire December 14, 1957.

(s) Ann Rader,
Notary Public,
Perry County, Kentucky.

## APPENDIX E.

### PETITION FOR WRIT OF CORAM NOBIS IN PART.

3. As further grounds for the issuance of the writ of coram nobis, your petitioner respectfully states that during his trial and at a time when he and his attorney were in a witness room off from the main court room in a conference, the Judge of this court, who presided at the trial, in the presence and hearing of all the jury said to the Clerk of the Court: "Tell them (referring to your petitioner and his attorney) to come in, they have already had an hour to fix that pocket." And he states that neither he nor his attorney had knowledge of said prejudicial statement until after the trial and, by reason of his lack of knowledge of what the court said out of his presence and the presence of his attorney neither he nor his attorney was afforded an opportunity to object to said prejudicial statement or to move to set aside the swearing of the jury, and he files herewith as a part hereof affidavits . . . showing that not only did the court make said statement out of his presence, but that on several other occasions throughout the trial, the said Judge in the presence of the jury and loud enough for the jury to hear, made reference to the pocket of the trousers of your petitioner as having been sewed up in order to leave the jury to believe that your petitioner had done this for the purpose of misleading the jury to believe that your petitioner had improperly done this in order to demonstrate that his pocket would not conceal the pistol, which he was accused of having concealed, and your petitioner states that said statements made by the court were made in such a tone of voice as to clearly leave the impression with the jury that the court did not believe the testimony of your petitioner, as had

been previously given, to the effect that the pocket of his trousers had been sewed up prior to his arrest on the charge for which he was being tried. He states that these highly prejudicial and unwarranted statements tended to and were such that did influence the members of the jury in their decision on the facts in this case. Your petitioner respectfully states that the making of said statements in the presence of the jury was arbitrary and unlawful and by reason thereof denied to your petitioner due process of law as guaranteed to him under said Constitution of Kentucky and the Constitution of the United States as foresaid, and the making of said statements by said Judge in the presence of the jury clearly demonstrated that the court trying him was not impartial, and he states that by reason thereof he was denied due process of law in violation of Section 14 of the Constitution of Kentucky and the Fourteenth Amendment to the Constitution of the United States.

## APPENDIX F.

### BRIEF FOR APPELLANT IN PART.

### Appellant's Constitutional Rights Violated.

I

Under the provisions of Section Fourteen of the Bill of Rights of the Kentucky Constitution and under the provisions of the Fourteenth Amendment to the Constitution of the United States, appellant was entitled to a trial by due course of law, and under the provisions of the Bill of Rights of the Constitution of Kentucky, Section 7, and the United States Section 6, he was entitled to a public trial by an impartial jury.

## APPENDIX G.

COURT OF APPEALS OF KENTUCKY

No. ———

LOGAN COLLINS, - - - - - - - - *Appellant,*

*v.*

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

### ORDER.

The appellant, Logan Collins, by counsel having moved that the mandate issued herein on the 25th day of January, 1957, be recalled and that proceedings thereon be stayed until Petition for Writ of Certiorari be filed in the Supreme Court of the United States within the time and manner provided by the Judicial Code of the United States, said motion is allowed and it is therefore ordered that said mandate be recalled and proceedings thereon be stayed, conditioned, however, on the giving of good and sufficient security that if the appellant fails to make application for such Writ within the time alloted therefor, or fails to obtain an Order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the appellee may sustain by reason of the stay.

This 20th day of February, 1957.

Chief Justice,
Court of Appeals of Kentucky.